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February 11, 1993

VIA HAND DELIVERY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: MM Docket No. 92-266


Dear Ms. Searcy:

Enclosed for filing in the above-captioned proceeding are an original and nine copies of the Reply Comments of the Office of the City Attorney, City of Los Angeles, California.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

MILLER & HOLBROOKE

By 
Teresa D. Baer

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Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Sections of the)
Cable Television Consumer Protection)
and Competition Act of 1992)

Rate Regulation)

MM Docket No. 92-266

REPLY COMMENTS OF
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February 11, 1993

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SUMMARY

1. Contrary to the views of the Competitive Cable Association ("CCA"), Section 623 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), 106 Stat. 1460 (to be codified at 47 U.S.C. § 543), is plainly constitutional. The Supreme Court has repeatedly upheld against First Amendment attack legislation and regulations -- including rate regulation -- directed at specific economic and structural problems in media-related industries. There is no basis for treating any differently problems arising out of cable operators' monopoly power. Moreover, since the First Amendment gives cable operators no constitutional guarantee of any profit at all -- much less monopoly profits -- they cannot complain that the statute directs the Federal Communications Commission ("FCC" or "Commission") to promulgate regulations ensuring them only a reasonable profit.

2. CCA's contention that municipalities and cable operators have conspired to exclude competition, and that therefore the Commission should make "open" franchising a prerequisite to rate regulation by municipalities, is misguided for four reasons. First, CCA's contention -- based in large part on misrepresentations about presently pending litigation between the City of Los Angeles and Preferred Communications, Inc., a company represented by CCA's counsel -- lacks any factual support whatsoever, and, indeed, is contradicted by cable television

economics in both theory and practice. Second, it makes no sense; CCA's thesis that municipalities are in cahoots with franchised operators fails in the face of the numerous comments submitted in this proceeding by municipalities seeking not to conspire with operators but to regulate them. Moreover, if a municipality were conspiring with a cable operator, any "open" franchising prerequisite for rate regulation would be irrelevant because the municipality presumably would have no desire to restrict an operator's ability to earn monopoly profits. Third, CCA not only ignores another provision in the 1992 Cable Act making clear that cities may deny competitive franchises; CCA also misconstrues Congress' directive to the FCC to promulgate rules for regulating rates where there is no effective competition within the meaning of the 1992 Cable Act, regardless of whether a municipality has opened its rights-of-way to all comers. Fourth, CCA ignores the nature of cable television's comprehensive and permanent use of scarce public rights-of-way and cities' utility infrastructures, which cannot accommodate an infinite number of cable systems.

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MM Docket No. 92-266

REPLY COMMENTS OF
OFFICE OF CITY ATTORNEY
CITY OF LOS ANGELES, CALIFORNIA

The Office of the City Attorney, City of Los Angeles, California ("Los Angeles") submits these Reply Comments in response to the initial comments filed in the above-captioned proceeding. In particular, Los Angeles responds to the First Amendment challenges to Section 623 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), 106 Stat. 1460 (to be codified at 47 U.S.C. § 543), raised by the Competitive Cable Association ("CCA") in its initial comments.

ARGUMENT

I. RATE REGULATION IS PLAINLY CONSTITUTIONAL.

Contrary to what CCA would have the Federal Communications Commission ("FCC" or "Commission") believe, CCA Comments at 1-2, the rate regulation provision of the 1992 Cable Act is clearly constitutional. Los Angeles agrees that the Commission is not

the appropriate forum to adjudicate the constitutionality of the rate regulation provision; however, Los Angeles wishes to make clear that the First Amendment poses no bar to the Commission's efforts to carry out this congressionally mandated proceeding. Indeed, the Supreme Court has consistently found economic regulations constitutional, and it is difficult to imagine a more classic form of constitutionally permissible economic regulation than rate regulation. Moreover, courts have never held that an industry is constitutionally entitled to earn any profit at all, much less monopoly profits.

Clearly, "not every action by the government which affects the press violates the first amendment."¹ The Supreme Court has repeatedly upheld against First Amendment attack legislation and regulations directed at specific economic and structural problems in media-related industries. For example, with respect to the broadcast industry, the Court has upheld the FCC's restrictions on "chain broadcasting"² and on common ownership of a broadcast station and a newspaper in the same community.³ Similarly, the FCC places restrictions on multiple broadcast station ownership, e.g., 47 C.F.R. § 73.3555, and certain exclusive affiliation agreements between broadcast networks and broadcast licensees,

¹ P.A.M. News Corp. v. Butz, 514 F.2d 272, 277 (D.C. Cir. 1975).

² National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

³ FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978).

see 47 C.F.R. § 73.658(a). In addition, broadcasters are subject to the ultimate form of rate regulation: Long-standing FCC rules and policies require that broadcast service, by definition, be provided free of charge.⁴

Broadcasters are not the only media subject to such economic regulation. Courts also have upheld economic regulation of the structure of the print⁵ and movie⁶ media. Moreover, cable operators are the beneficiaries of a mandatory copyright license that requires programmers to sell programming to cable operators at government-regulated prices. See 17 U.S.C. § 111. In addition, the antitrust laws have long been applied to the

⁴ See, e.g., Subscription Video, 2 FCC Rcd 1001, 1004, 62 R.R.2d (P&F) 389, 395-97 (1987) (broadcast service defined by FCC as service intended to be provided to the general public for free, as opposed to services such as subscription television that are intended only for paying subscribers), recon. denied, 4 FCC Rcd 4948 (1989).

⁵ See, e.g., Associated Press v. United States, 326 U.S. 1, 20 (1945) (noting that "[t]he First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity"); Committee for an Independent P-I v. Hearst Corp., 704 F.2d 467, 474 (9th Cir.) (holding that Newspaper Preservation Act regulating the "[u]nique economic forces" in newspaper industry did not violate First Amendment), cert. denied, 464 U.S. 892 (1983); cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (upholding municipal ordinance forbidding newspapers to carry employment ads in sex-designated columns).

⁶ See, e.g., Schine Chain Theatres v. United States, 334 U.S. 110 (1948) (upholding restrictions on ownership of theaters by chain).

media.⁷ And the only users of public rights-of-way that are remotely comparable to cable operators -- telephone and traditional public utilities -- are, of course, subject to extensive regulation, including rate regulation.

The rate regulation provision of the 1992 Cable Act rests on Congress' finding of a particular structural problem in the cable industry: With rare exception, cable operators are monopolists. CCA would have the Commission believe that cable monopolies are caused by sinister conspiracies between municipal regulators and cable operators. In fact, as we discuss in Part II below, it is the economics of cable television that creates cable monopolies in the vast majority of communities. As Congress noted in the 1992 Cable Act, the rate regulation provision is intended to ameliorate the adverse effects of cable operators' exercise of market power by ensuring that operators charge reasonable rates where they are not subject to effective competition.⁸

⁷ See, e.g., United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) (holding unlawful the "blockbooking" of copyrighted films by lessors); Schine Chain Theatres, 334 U.S. 110 (restricting ownership of theaters by chain); United States v. Griffith, 334 U.S. 100 (1948) (holding unlawful a theater owner's wielding of lawful monopoly power in one market to coerce concessions that handicapped its competitors in another); see also Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) (holding that evidence was insufficient to show specific intent to destroy competition or build monopoly where two newspapers under single ownership required advertisers to purchase space in both papers).

⁸ See 1992 Cable Act §§ 2(a), (b)(4-5) & 623, 106 Stat. at 1460-63, 1464-71.

There is no conceivable basis for treating the economic and structural problems in the cable industry any differently from similar problems in other media. To the extent that CCA suggests that judicial recognition of cable as a First Amendment speaker somehow distinguishes cable, CCA Comments at 5, 10, it is a distinction without a difference. First of all, courts have repeatedly upheld governmental regulation of cable against First Amendment challenges.⁹ Second, even assuming that cable were entitled to the same degree of First Amendment protection afforded the print media,¹⁰ CCA's argument would fall flat; since the print media is subject to economic regulation, surely cable could be no different. Indeed, CCA has conceded that

⁹ See, e.g., Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540 (7th Cir. 1989), cert. denied, 493 U.S. 1044 (1990); Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986), cert. denied, 480 U.S. 910 (1987); Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982); Community Communications Co. v. City of Boulder, 660 F.2d 1370 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982); Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383 (S.D. Fla. 1991), appeal docketed, No. 91-5908 (11th Cir. Oct. 11, 1991); Preferred Communications, Inc. v. City of Los Angeles, No. CV 83-5846 (CBM), Memorandum Order (C.D. Cal. Aug. 24, 1990); Preferred Communications, Inc. v. City of Los Angeles, No. CV 83-5846 (CBM), Memorandum Order (C.D. Cal. Jan. 5, 1990); Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580 (W.D. Pa. 1987), aff'd on other grounds, 853 F.2d 1084 (3d Cir. 1988); Carlson v. Village of Union City, 601 F. Supp. 801 (W.D. Mich. 1985); Berkshire Cablevision of Rhode Island, Inc. v. Burke, 571 F. Supp. 976 (D.R.I. 1983), vacated as moot, 773 F.2d 382 (1st Cir. 1985); Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc., 562 F. Supp. 543 (W.D. Ky. 1982).

¹⁰ See, e.g., Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1 (1986); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

"structural regulation of the cable television industry . . . may be constitutional." CCA Comments at 2.

In comparison with other industries, cable operators' comprehensive use of scarce public rights-of-way and utility infrastructure, discussed in Part II below, provides all the more reason for ensuring that municipalities have effective mechanisms to safeguard against the negative impact of economic and structural problems in the industry. Congress recognized in 1984 that rate regulation is "tied to the cable system's use of city streets [Rate regulation] was seen as a means to prevent cable operators from charging unreasonably high rates for what was seen as an 'essential' service"¹¹

Cable operators cannot possibly claim that they have any constitutional right to earn excess profits. In fact, the First Amendment does not even guarantee cable operators a right to operate at a profit. As the Eleventh Circuit explained in upholding a city ordinance permitting a city to operate a cable system in competition with an existing franchisee:

What the City's ordinance does abridge is the continuation of Warner's profitable position as the only speaker in a captive cable market. A City-owned cable system, if successful, will no doubt reduce the audience for Warner's speech and diminish the

¹¹ H.R. Rep. No. 934, 98th Cong., 2d Sess. 24, reprinted in 1984 U.S.C.C.A.N. 4655, 4661; see also California v. Central Pac. R.R. Co., 127 U.S. 1, 40 (1888) (noting that a franchise is a right "of public concern, which ought not to be exercised by private individuals at their mere will or pleasure, but should be reserved for public control and administration . . . under such conditions and regulations as the government may impose in the public interest, and for the public security.").

profitability of that speech. Such economic loss, however, does not constitute a first amendment injury. "The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression." . . . Warner's freedom of expression remains unimpaired by the City's plan.¹²

So too, the court in Gannett Satellite Information Network, Inc. v. Berger upheld a restriction against newsracks in airports, explaining that:

Addition of these machines serves only the economic interests of publishers and the convenience of the public. It may be that newspaper distributors can sell more newspapers by placing their newsracks in public areas. However, those seeking to distribute more newspapers cannot use the absolute protection of the First Amendment to guarantee additional sales. . . . [W]hen the placement of newsracks merely serves as an additional, more desirable manner of distribution, the absolute protection of the First Amendment is not available.¹³

The rate regulation provision of the 1992 Cable Act does no more than direct the Commission to promulgate regulations that may, in some franchise areas, have the effect of decreasing existing monopoly profits while ensuring that cable operators

¹² Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634, 638 (11th Cir. 1990), cert. denied, 111 S. Ct. 2839 (1991) (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 78 (1976) (Powell, J., concurring)) (citation omitted; emphasis in original).

¹³ 716 F. Supp. 140, 148 (D.N.J. 1989), aff'd in part, rev'd in part on other grounds, 894 F.2d 61 (3d Cir. 1990); accord National Market Reports, Inc. v. Brown, 443 F. Supp. 1301, 1304 (S.D.W. Va. 1978) (upholding state statute requiring use of competitor's publication because "at most the statute results in an infringement upon plaintiff's profits, not its First Amendment rights"); P.A.M. News Corp., 514 F.2d 272 (holding that Department of Agriculture's operation of its own wire service in competition with plaintiff may harm plaintiff economically, but did not infringe any First Amendment right).

continue to earn a profit. Section 623(b)(2)(C) of the 1992 Cable Act provides that, in determining a reasonable rate for basic cable service, the Commission "shall take into account," inter alia, "the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier," 1992 Cable Act § 623(b)(2)(C)(ii), 106 Stat. at 1466; and "a reasonable profit," id. § 623(b)(2)(C)(vii), 106 Stat. at 1466. Cable operators cannot seriously contend that they will suffer First Amendment injury by having to "figure out how much activity [they] can afford within the mandated price limit," CCA Comments at 1 n.2, because, by definition, the regulations that the Commission will promulgate will affect only their excess profits. Since cable operators have no constitutional guarantee of a profit, they can hardly be heard to complain that the statute ensures that they will receive only "a reasonable profit" instead of a monopolistic one.

II. THERE IS NO FACTUAL, LEGAL, OR CONSTITUTIONAL BASIS FOR MAKING "OPEN" FRANCHISING A PREREQUISITE TO RATE REGULATION BY MUNICIPALITIES.

CCA contends that the Commission should prevent municipalities from regulating rates or taking various other actions unless they have an "open" franchising process. CCA Comments at 8-12. CCA bases its contention on the unsupported and patently false assertion that municipalities have conspired with the cable operators they franchise to prevent competition in the cable market. See, e.g., id. at 2-3, 8. CCA's argument

lacks any factual support whatsoever, defies logic, ignores Congress' directive to the Commission, and is based on a fundamental misunderstanding of the nature of cable television and cable's use of public rights-of-way.

First, the only support CCA offers for its curious conspiracy theory of cable television is its bald allegation that Los Angeles has "acted to deny competition" by refusing entry to Preferred Communications, Inc. ("Preferred"). CCA Comments at 7, 8-9. Remarkably, CCA, which is represented by the same counsel as Preferred, fails to mention that Preferred is nothing more than a shell company with none of the technical or financial qualifications necessary to construct and operate a cable television system. Indeed, a federal district court found that Preferred has no assets other than an undocumented loan of a nominal amount, and that it has never had a single employee or consultant, much less an office or a telephone; the court further found that neither the company nor its principals have any experience in constructing or operating cable systems.¹⁴ Not surprisingly, in view of its woeful lack of qualifications, Preferred never had any source of financing to construct the cable system that it supposedly wished to build in Los Angeles,

¹⁴ See Preferred Communications, Inc. v. City of Los Angeles, No. CV 83-5846 (CBM), Order re Defendants' Motion for Summary Judgment as to Plaintiff's Damages Claims (C.D. Cal. May 23, 1989).

even though it admitted that the system would cost at least \$26 million.¹⁵

CCA also fails to inform the Commission that the court held that the City's technical and financial requirements for cable operators -- requirements that Preferred could not conceivably meet -- were constitutional.¹⁶ Thus, CCA's suggestion that Preferred would be providing competition in the Los Angeles cable market but for the City's refusal to grant it a franchise is squarely contradicted by the facts.¹⁷ In fact, the record in the Preferred litigation shows that only one cable system can operate in any given area of Los Angeles, not because of the City's process, but because of the economics of cable television. As with a public utility, the relationship between demand for

¹⁵ Supp. Decl. of Willard A. Hargan in Opp. to Defts' Motions for Summary Judg. at ¶ 7, filed in Preferred Communications, Inc. v. City of Los Angeles, No. CV 83-5846 (CBM) (C.D. Cal. Nov. 11, 1988).

¹⁶ See Preferred Communications, Inc. v. City of Los Angeles, No. CV 83-5846 (CBM), Memorandum Order (C.D. Cal. Aug. 24, 1990).

¹⁷ Counsel for CCA/Preferred also attempts to mislead the Commission in citing Preferred's second lawsuit against Los Angeles, Preferred Communications, Inc. v. Herman, No. 92-56109 (9th Cir. filed July 29, 1992), as support for its conspiracy theory. CCA correctly states that the suit "alleged that Susan Herman, among others has, for years, acted to deny competition in the City of Los Angeles." CCA Comments at 7. What CCA conveniently fails to reveal, however, is that the federal district court judge ruled against Preferred, and in favor of the City and individual defendants. Moreover, the district court has indicated that some of the claims brought by Preferred were so frivolous that they should never have been brought, and that the court would award the City its attorneys' fees in defending against those claims.

cable services and the technology of supply is such that in most geographic areas (and the area in Los Angeles at issue in Preferred in particular), market demand can be satisfied at lowest cost by a single firm. It is this simple economic fact, rather than any sinister conspiracy, that accounts for the fact that, of the 7,000-plus cable systems in the country, only a handful face head-to-head competition. And even in those areas, competition is rarely sustained.

CCA also urges the Commission to adopt rules that would nullify universal service requirements, which are commonly found in franchises throughout the country.¹⁸ Although it cites nothing to support its view, CCA attributes universal service requirements to the "machinations" of the "cozy twosome -- the locals and the incumbent cable operator -- sharing the spoils of the market while precluding anyone else from serving that market." CCA Comments at 9. CCA then argues that "universal service is a public utility concept that is improperly applied to cable television, a recognized First Amendment speaker," CCA Comments at 10, and misleadingly cites the Ninth Circuit's decision in Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985), aff'd on narrower grounds, 476 U.S. 488 (1986), as support for its proposition. But nowhere does the Ninth Circuit say that universal service is

¹⁸ CCA urges that "other 'level playing field' gambits must be condemned" along with universal service, CCA Comments at 9, but nowhere identifies what these may be, much less provide any reasoned analysis of why the Commission should condemn them.

a public utility concept improperly applied to cable television. In fact, the district court in Preferred held that Los Angeles' universal service requirement is constitutional, finding that the City had a compelling interest in ensuring that a cable operator, which operates its business on public property, makes cable service available equally to all members of the public.¹⁹

Second, CCA's argument makes no sense. The active role played by municipalities in supporting rate regulation legislation in the Congress, and the submission to the FCC of comments in this proceeding by municipalities proposing effective rate regulation mechanisms,²⁰ make clear that municipalities actively wish to regulate operators, not conspire with them. Moreover, if, as CCA asserts, there actually were "a cozy, symbiotic relationship between the municipal regulator and the regulated entity intended to share monopoly profits," CCA Comments at 3, 8, municipalities certainly would not want to diminish those monopoly profits by regulating rates. Thus, there would be no need to require that a city have an "open" franchising system before it could regulate rates.

Third, CCA's proposal ignores the statute. The 1992 Cable Act in no way makes "open" franchising a prerequisite to rate

¹⁹ Preferred Communications, Inc. v. City of Los Angeles, No. 83-5846 (CBM), Order (C.D. Cal. March 26, 1991); see also Riviera Beach, 773 F. Supp. at 399-406 (upholding constitutionality of universal service requirement).

²⁰ See, e.g., Comments of Austin, Texas; Dayton, Ohio; Dubuque, Iowa; Gillette, Wyoming; Montgomery County, Maryland; St. Louis, Missouri; and Wadsworth, Ohio.

regulation; it provides only that cities "may not unreasonably refuse to award an additional competitive franchise." 1992 Cable Act § 621(a)(1), 106 Stat. at 1483. Rather, the statute specifically makes the absence of effective competition the prerequisite to rate regulation. The statute provides that "[a]ny franchising authority may regulate the rates for the provision of cable service . . . but only to the extent provided under this section." Id. § 623(a)(1), 106 Stat. at 1464. It goes on to make clear that the Commission shall promulgate regulations to permit rate regulation where "a cable system is not subject to effective competition." Id. § 623(a)(2), 106 Stat. at 1464. Thus, under the 1992 Cable Act the Commission simply is not at liberty to promulgate regulations that require "open" franchising, in lieu of or in addition to the absence of effective competition, as a prerequisite to rate regulation.

Fourth, CCA's contention that "open" franchising should be a prerequisite to municipal rate regulation is based on erroneous assumptions about the nature of cable television and cable's use of public rights-of-way. The installation and operation of a cable television system inherently involves significant and long-term occupation of valuable public property. As Congress recognized in enacting the 1992 Cable Act, "similar to the telephone system, [a cable operator] must use governmental property to string its wires, lay its cable in ducts, and obtain

necessary rights-of-way."²¹ In fact, a cable television system consists of a permanent street-by-street, house-by-house distribution system of hundreds of miles of cables and equipment installed on utility poles and in underground utility conduits, much like an electric, telephone, water, or gas system. The utility poles and underground conduits, as well as the property traversed by aerial cable wires, are located on or under public streets and rights-of-way held by a city or state in fee or through permanent easements. In Los Angeles, for example, cable systems occupy approximately 6,500 plant miles of city rights-of-way and utility infrastructure, an amount unparalleled by any business other than public utilities.

Despite what CCA would have the Commission believe, the public rights-of-way and utility infrastructure cannot physically accommodate all who might wish to build and operate a cable system. In fact, the practical capacity of the poles and the underground conduits is limited. A municipality's utility infrastructure can no more accommodate an infinite number of cable systems than it can accommodate an infinite number of telephone, electric, water or gas distribution systems.

Courts have made clear that it is not compatible with the purpose of a city's infrastructure -- to provide utility, municipal, and other services for public, as opposed to private, benefit -- to throw open that infrastructure to "all cable-

²¹ S. Rep. No. 92, 102d Cong., 1st Sess. 51 (1992), reprinted in 1992 U.S.C.C.A.N. 1133, 1184.

television comers, regardless of size, shape, quality, qualifications or threat to the ultimate capacity of the system."²² So too, the 1992 Cable Act specifically provides that cities are not required to grant franchises to anyone who wants one.²³ Indeed, if a city were required to open its infrastructure to all comers, no matter how unqualified, as CCA apparently would have it, every member of the public would have a right to occupy city property with cable plant. That proposition simply makes no factual or constitutional sense.

²² Pacific West Cable Co. v. City of Sacramento, 798 F.2d 353, 355 (9th Cir. 1986).

²³ See 1992 Cable Act § 621(a)(1), 106 Stat. at 1483 (providing only that a city "may not unreasonably refuse to award an additional competitive franchise").

CONCLUSION


For the foregoing reasons, the Commission should conclude that the First Amendment poses no bar to the Commission's carrying out these congressionally mandated proceedings, and that "open" franchising should not be a prerequisite to rate regulation by municipalities.

Respectfully submitted,

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